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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 412

THE FIRST NATIONAL BANK OF CHICAGO, EDGAR STANTON AND JOSEPH C. BELDEN, TRUSTEES FOR THE REW TRUST, TRANSFEREES,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HERBERT POPE,
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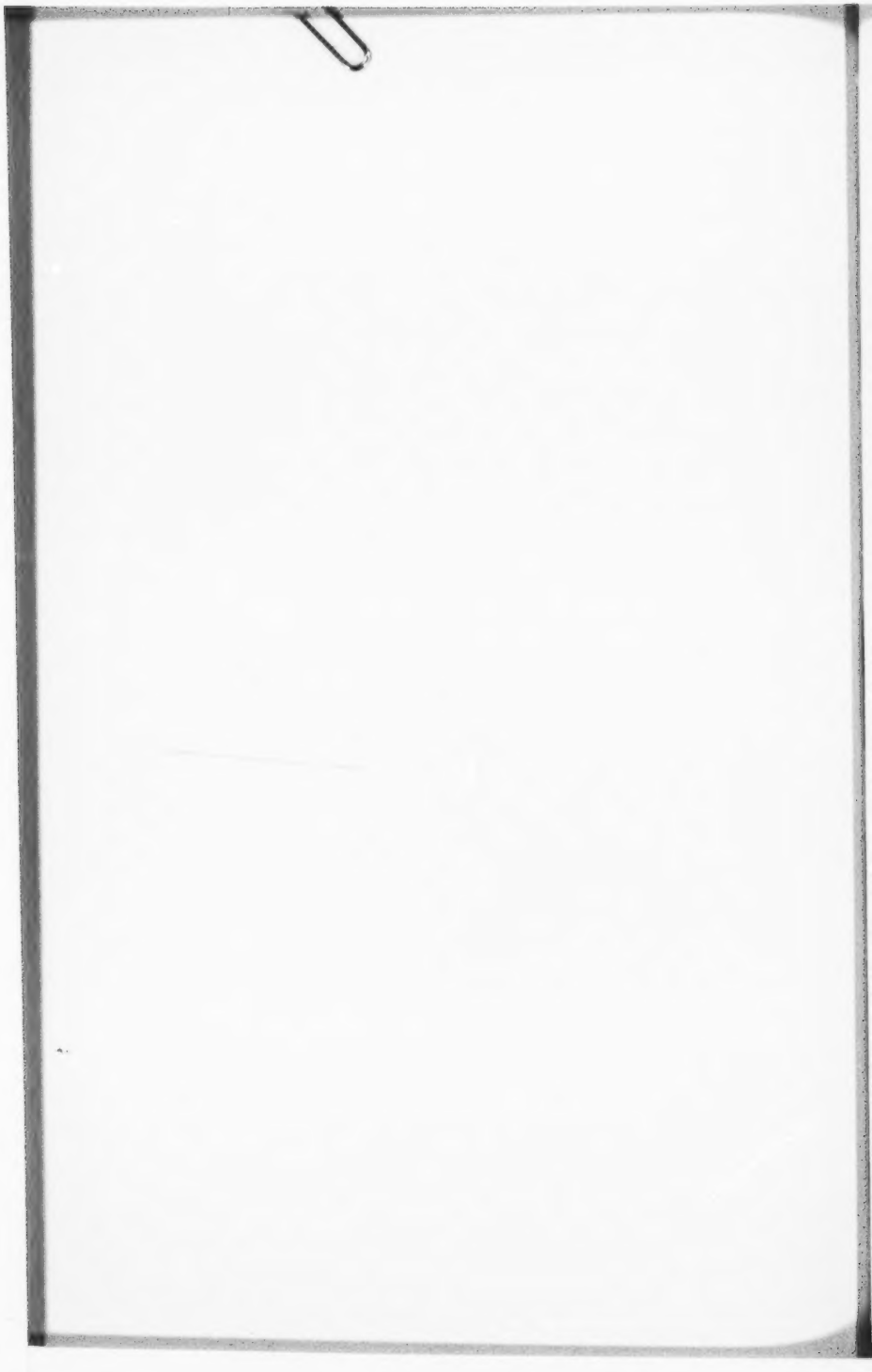

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COMMISSIONER OF INTERNAL REVENUE,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, who are the trustees of the Rew Trust, a trust created by George Campbell Rew, now deceased, respectfully pray for the allowance of a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review the judgment of that court entered in the above case on May 13, 1940.

Summary Statement of Matter Involved.

This petition is for review of a judgment of the United States Circuit Court of Appeals for the Seventh Circuit (R. 101) which affirmed a decision of the United States Board of Tax Appeals determining a liability of petitioners, as transferees of George Campbell Rew, deceased, for income taxes alleged to be due by him for the period January 1, 1924, to June 10, 1924, in the amount of $75,478.47 (R. 80).

Nearly thirteen years after Rew's death in June, 1924, a notice of transferee liability was sent to First National Bank of Chicago, Trustee for the Rew Trust, as a transferee of Rew in his lifetime, and one of the principal questions raised before the Board of Tax Appeals and the Circuit Court of Appeals was whether the statute of limitations had barred any assessment against petitioners, as transferees, for a tax liability alleged to have been incurred by Rew before his death. It was conceded that such assessment was barred in 1929 by the provisions of Section 280(b) and (c) of the Revenue Act of 1926, (Appendix, p. 28), unless the running of the period of limitations provided for in that section was suspended under Section 277(b) (Appendix, p. 27), by a futile proceeding against Rew's executors, who were known to possess no assets beyond what was required to pay taxes and expenses, on the theory that such a proceeding was a proceeding against Rew, the taxpayer. This theory was sustained by the Court of Appeals, that Court holding that the executors, upon their qualification, became Rew, the taxpayer, and the transferor of property in fact transferred by the decedent in his lifetime. This conclusion is based upon Section 281(a) of the Revenue Act of 1926 which the Court of Appeals interprets as meaning that "the executors, upon qualification, so far as liability

of Rew for income tax was concerned, assumed the power, rights, duties and privileges of the taxpayer." (R. 96.) The Court of Appeals ignores the fact that this section of the Revenue Act was not enacted until nearly two years after Rew's death and after his executors had qualified, that the notice required by that section was never given at any time, and that its decision is therefore in direct conflict with the facts and also with a decision of the Second Circuit Court of Appeals to which we will refer. Section 281(a) does not purport to make an executor responsible for all the acts done by the decedent, or for property which the executor did not and could not receive. (Appendix, p. 28.)

Furthermore, this section, which, if applicable, changed the case from one governed by the local law of Illinois to a case governed by a federal statute, was mentioned for the first time by counsel for respondent at the oral argument in the Circuit Court of Appeals and was not asserted before the Board of Tax Appeals or mentioned in the Board's decision. A petition for rehearing (R. 105) called this to the attention of the Court, as well as the fact that in other respects the decision was in conflict with the decisions of all common law courts, including decisions of this Court and of the Supreme Court of Illinois. The petition was nevertheless denied on June 11, 1940.

The Circuit Court of Appeals also held that the decision against the executors was *res judicata* in this proceeding involving transferees of the decedent, although this Court and the Supreme Court of Illinois have both held that a decision against an executor is confined to the property received and held by the executor.

The Circuit Court of Appeals did not consider whether under the decisions of this Court no taxable gain was realized by the taxpayer, the decedent Rew, on an exchange of securities because he was under obligation not

to sell or pledge the securities agreed to be received within six months after he received them. And it did not consider other questions involving the liability of the taxpayer because of its decision on the question of *res judicata*. So far as this petition is concerned the primary question is the suspension of the running of the statute of limitations. The plea of *res judicata* depends upon the same novel theory of the identity of a decedent and his executors with reference to property which the executor did not and had no right to receive.

The transaction here involved occurred nearly seventeen years ago. On December 31, 1923, George Campbell Rew entered into a contract with Peabody, Houghteling & Company, an investment firm, whereby he agreed to deliver and did deliver to Peabody, Houghteling & Company certain preferred stock owned by him in exchange for an agreement to deliver to him certain unlisted bonds which were later delivered to him (R. 23-24). The contract, among other things, provided that Rew could not sell, directly or indirectly, or pledge the securities received by him for a period of six months from the date of the contract (R. 11, 24, 25, 26). The securities received in compliance with that agreement by Rew were miscellaneous unlisted bonds comprising 30 issues (R. 12, 13, 14). Even if Rew had been permitted by his contract to sell these bonds, there was no market whatever for most of them. He could have sold at a discount, had he been permitted to sell by his contract, his small holdings of three issues, but could not have sold the rest of his holdings, except very limited amounts of seven issues, and those he would have had to sell at considerably less than their fair value. (R. 28, 34 to 39, 46).

Rew died on June 10, 1924. Shortly thereafter his will was probated in the Probate Court of Cook County, Illinois, and Edgar Stanton and Joseph C. Belden were

duly appointed as executors of his estate (R. 19). On or about October 8, 1924, the executors, in compliance with section 225 of the Revenue Act of 1924 and the regulations thereunder, filed a federal income tax return on behalf of the decedent for the period from January 1, 1924, to June 10, 1924, with the Collector of Internal Revenue at Chicago, Illinois (R. 19). Thereafter, the Commissioner of Internal Revenue audited said return and claimed that Rew, by virtue of the exchange made by him, pursuant to the contract of December 31, 1923, realized taxable income subject to tax in the amount of $75,478.47, which had not been reported in the return (R. 9). A notice of deficiency was sent to the executors of Rew's will on September 11, 1928 (R. 20).

The executors appealed to the Board of Tax Appeals from such notice of deficiency, claiming that Rew was not taxable, under the provisions of section 202 of the Revenue Act of 1921 relating to exchanges of property for property not having a "readily realizable market value" —a concept that was not carried over into the 1924 Revenue Act, the provisions of which are involved in this proceeding. They claimed that the exchange occurred in 1923 and that likewise any income attributable thereto accrued in 1923. On June 5, 1936, the Board rendered a decision adverse to the executors (34 B. T. A. 451). The Circuit Court of Appeals affirmed the Board's decision on July 28, 1938, *Stanton* v. *Commissioner*, 98 F. (2d) 739. A petition for certiorari was denied by this Court on December 5, 1938 (305 U. S. 650).

Before his death Rew had created two trusts. One dated December 31, 1923, was designated "The George Campbell Rew Trust" and in it he transferred to the trustees therein named certain securities. Among the securities embraced in the trust were all of the securities acquired by him in the transaction that was the subject

matter of the litigation described in the proceedings against the executors (R. 75). On March 10, 1924, Rew created another trust designated "The Rew Trust" and transferred to himself as trustee thereof substantially all his remaining assets (R. 19). It is this latter trust which the petitioners as trustees represent in this proceeding. In this trust the decedent reserved to himself for life the income from the trust, and also retained an unlimited power of revocation.

On June 23, 1937, approximately 13 years after Rew's death, a notice of transferee liability was sent to First National Bank of Chicago, trustee for The Rew Trust, as transferee of the assets of the decedent, proposing to assess a transferee liability of $75,478.47 plus interest against The Rew Trust as transferee. These petitioners as trustees of The Rew Trust filed a timely appeal to the Board of Tax Appeals from such notice of liability (R. 1, 7).

Before the Board these petitioners claimed that the statute of limitations barred the assessment against them of any tax liability of Rew; that by reason of the restriction contained in the contract of December 31, 1923, under which Rew received the securities from Peabody, Houghteling & Company, the "fair market value" of the securities received by him could not be ascertained with certainty sufficient to satisfy the requirement of the Revenue Act of 1924; that if there was a taxable gain it was realized in 1923, not in 1924, the year here involved; and that they were not liable as transferees of a revocable trust. The Commissioner took issue with the claim relative to the statute of limitations and pleaded that the proceeding between the Commissioner and the executors was *res judicata* of the tax liability and precluded a contest on the merits of the tax by these petitioners.

The Board, and the Circuit Court of Appeals upon ap-

peal from the Board's decision, decided against the petitioners by holding that the proceedings between the Commissioner and the executors suspended the running of the statute of limitations for assessment against these petitioners and that the judgment against the executors was *res judicata* and precluded these petitioners from contesting the validity of the tax.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 13, 1940 (R. 101). A petition for rehearing was subsequently filed and was denied by that Court on June 11, 1940 (R. 113). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether Section 281 (a) of the Revenue Act of 1926 applies in this case when it was not enacted until after the death of Rew and after the qualification of his executors.

2. Whether the Court of Appeals was justified in basing its decision upon Section 281 (a) when the applicability of that provision was not mentioned until the oral argument in that Court and was not presented to or considered by the Board of Tax Appeals.

3. Whether the Court of Appeals, by reason of Section 281 (a), was justified in holding that the executors of Rew's estate, upon their qualification, became the taxpayer in the place of the decedent and the transferor of property transferred in fact by the decedent.

4. Whether the Court of Appeals was justified in holding that this proceeding was not barred by the statute of

limitations by reason of Section 281 (a) or for any other reason.

5. Whether the Court of Appeals was justified in holding that the judgment in the prior proceeding against Rew's executors was *res judicata* by reason of Section 281 (a) or for any other reason.

6. Whether the Court of Appeals erred in failing to hold that the sales restrictions in the contract of December 31, 1923, under which Rew received the securities from Peabody, Houghteling & Co. deprived the securities of an ascertainable fair market value sufficient to support an income tax upon their receipt.

7. Whether the Court of Appeals erred in failing to remand the case to the Board with directions to find facts showing whether the sale of securities occurred in 1923 or 1924.

8. Whether the Court of Appeals erred in holding that the petitioners became transferees who were liable for the alleged income tax liability of Rew.

Reasons Relied on for Allowance of the Writ.

In two respects the decision of the Circuit Court of Appeals is in direct conflict with decisions of Circuit Courts of Appeal of other circuits. It is also in conflict with decisions of the Supreme Court of Illinois, which should govern, and with decisions of this Court which state the law of the country on the effect of judgments against an executor.

1. As to the application of Section 281 (a) of the Revenue Act of 1926, the decision is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Liberman's Committee* v. *Commissioner*, 54 F. (2d) 527. In both cases the transaction in question took place before that provision of the Revenue Act was

enacted. The Second Circuit held that in such a case the provision could have no application. In this case the Court of Appeals gave the provision controlling effect.

The Court of Appeals, instead of basing its decision upon the local law governing the relation of an executor to the decedent and to other persons receiving other property from the decedent, based its decision upon the ground that "the theory of income taxation" had made the executors in this case "for the purpose of determination, the transferor himself." (R. 98.)

The Court of Appeals avoids the decisions of the Supreme Court of Illinois and of this Court, which are to the contrary, by not mentioning them at all and rests its decision upon the income tax acts. The only income tax provision referred to which is supposed to accomplish this revolution in the law is Section 281 (a) of the Revenue Act of 1926. As to this section the Court of Appeals says (R. 96):

> "Under Section 281 (a) the executors, upon qualification, so far as liability of Rew for income tax was concerned, assumed the power, rights, duties and privileges of the taxpayer."

When the executors qualified Section 281 (a) had not been enacted, and they had in fact filed the tax return which started the running of the statute of limitations in favor of petitioners, long before that section was enacted. No statutory provision is referred to by the Court of Appeals which prevented the Commissioner from proceeding at any time against petitioners. The suspension of the statute is based entirely upon the conclusion that Section 281 (a) made the executors the taxpayer in place of the decedent and the transferor of property which the decedent himself transferred to petitioners.

This conclusion is in direct conflict with the statement of this Court in *Hartley* v. *Commissioner,* 295 U. S. 216,

218, that "The revenue acts consistently treat the estate of a decedent in the hands of an administrator or executor as a separate taxpayer." It is that personal estate alone with which executors are concerned, and therefore a judgment against an executor does not affect an heir, and, as this Court said in *Ingle* v. *Jones*, 9 Wall. 486, 495, "the statute of limitations may be pleaded with the same effect as if there had been no prior recovery against the personal representative." That was the law at least prior to the passage of Section 281 (a), and the transactions in this case occurred before that.

It appears also that the question of the application of Section 281 (a) was mentioned for the first time by counsel for respondent at the oral argument in the Circuit Court of Appeals and was not asserted before the Board of Tax Appeals or mentioned in its decision. The notice required by that section was of course not given because the statute was not in existence when such a notice should have been given. The decision of the Court of Appeals therefore was based upon an assumption contrary to the record and involved a claim not made in the proceeding before the Board and is in conflict with decisions of this Court. It concerned an entirely new case, based upon a federal statute instead of the local law of Illinois.

General Utilities & Operating Co. v. *Helvering*, 296 U. S. 200.

Helvering v. *Tex-Penn Oil Co.*, 300 U. S. 481, 498.

Helvering v. *Wood*, 309 U. S. 344, 349.

2. The decision of the Circuit Court of Appeals is in conflict also with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Commissioner* v. *Krug*, 78 F. (2d) 57, in which a proceeding against one transferee of a taxpayer was held not to suspend the running of the statute of limitations against another transferee. If an

executor is confined to the personal estate which comes into his hands for transfer he is in no different position from another transferee of the decedent. A judgment against the executor can affect only the property which he receives. It is also expressly held by the Supreme Court of Illinois, as we shall show, that an executor has nothing to do with property claimed to have been fraudulently transferred by the decedent. Only creditors of the decedent can reach such property, and they can proceed against executors and transferees at the same time. A judgment against an executor, therefore, could not suspend the running of the statute of limitations in favor of a transferee any more than could a judgment against another transferee of the taxpayer, as was held in the *Krug* case.

Section 281(a) relates to all fiduciaries. There is no separate provision about executors and administrators. A judgment against an executor is in the same position as a judgment against another fiduciary who may receive property from the decedent. Under the decision in the *Krug* case, therefore, a judgment against one transferee trustee would not suspend the period of the statute of limitations in the case of another transferee trustee. Section 281(a) places an executor in the same position as any other fiduciary. If no executor had been appointed in this case the position of the petitioners would be just the same.

3. The Court of Appeals finds Section 281 (a) a reason for disregarding the express language of Subsection 280 (c) of the Revenue Act which fixes the period of the statute of limitations in the case of the death of a taxpayer. That section provides that "the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death * * * not occurred." The decedent is not only designated as the taxpayer in this provision but the period of limitation is to

be determined as to transferees and others in the same way that it would be if the taxpayer had not died. There is no provision to the effect that if executors are appointed they shall become the taxpayer in place of the decedent as to all property owned at any time by the decedent. Unless Subsection 280 (c) is completely ignored the statutory period in this case expired in 1929, eight years before the proposed assessment against petitioners.

In spite of the language of Subsection 280 (c), the Court of Appeals holds that executors when appointed became the decedent taxpayer and became the transferors of property in fact transferred by the decedent. We contend Section 281 (a) was not intended to modify Subsection 280 (c) or to overrule the law of the land in such violent fashion. Instead of applying Subsection 280 (c) according to its terms, as if death had not occurred, the Court of Appeals interprets the statute as recognizing that Rew did die and as providing that his executors became Rew and did all the things that Rew did.

4. The decision and the opinion of the Court of Appeals, if sustained and followed, would work a revolution in the administration of estates throughout the country. It is contrary to the settled law governing executors and administrators and their relation to the decedent and to other persons receiving property from a decedent. No authority has been cited which supports the Court's revolutionary conclusion, and it is in conflict with decisions of other Circuit Courts of Appeal as well as controlling decisions of the Supreme Court of Illinois and of this Court.

Sanborn v. *Helvering*, 108 Fed. (2d) 311, relied upon by the Court of Appeals, has no application. The tax period in question was the year 1929 and the decedent died in 1928. The executrix, and not the decedent, was the tax-

payer, and the property involved was the property in the estate which was transferred to a legatee.

For these reasons we submit that the decision in this case should be reviewed.

Wherefore, the petitioners respectfully pray that this petition for a writ of certiorari be granted and that the said judgment of the Circuit Court of Appeals for the Seventh Circuit be reviewed by this Court.

THE FIRST NATIONAL BANK OF CHICAGO,
EDGAR STANTON and JOSEPH C. BELDEN,
Trustees for the Rew Trust,
HERBERT POPE,
FRANCIS H. URIELL,
BENJAMIN M. PRICE,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported at 112 F. (2d) 260. The opinion of the Board of Tax Appeals (R. 73) is not reported.

Statement of the Case.

A statement of the case appears in the petition for the writ at pages 2 to 7, and for the sake of brevity is not repeated here.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that under Section 281 (a) of the Revenue Act of 1926 the executors, upon qualification, became the taxpayer in place of Rew and the transferors of property in fact transferred by Rew.

2. In holding that this proceeding was not barred by Section 280 of the Revenue Act of 1926.

3. In holding that the judgment against the executors in the prior proceeding was *res judicata* of the alleged tax liability in the present proceeding.

4. In failing to hold that the sales restrictions in the contract of December 31, 1923, under which Rew received the securities from Peabody, Houghteling & Co. deprived the securities of an ascertainable fair market value sufficient to support an income tax upon their receipt.

5. In failing to remand the case to the Board with directions to find facts showing whether the sale of securities occurred in 1923 or 1924.

6. In holding that the petitioners became transferees who are liable for the alleged income tax liability of Rew.

ARGUMENT.

I.

The Decedent Rew, and Not the Executors of His Estate, Was the Transferor and the Taxpayer in This Case Under the Federal Revenue Acts and the Law of Illinois, and the Proceeding Against the Executors Did Not Suspend the Running of the Statute of Limitations in Favor of Petitioners or Make the Prior Judgment Res Judicata as to Them.

It is not surprising that when the oral argument was reached in the Court of Appeals counsel for the Commissioner thought it desirable to support his contention by some federal statute and therefore referred for the first time to Section 281 (a) of the 1926 Revenue Act, forgetting evidently that that section was not enacted until after the death of Rew and the qualification of his executors. The opinion of the Board of Tax Appeals was not based upon any federal statute but upon phrases, principally from Illinois cases, to the effect that an executor "stands in the shoes" or "in the place" of the decedent. These phrases were held sufficient to make the decedent and his executor one and the same person.

Strangely enough these phrases were cited from Illinois cases in which the Supreme Court of that state expressly held that an executor had no concern with and no rights in relation to property which was transferred by the decedent in his lifetime. It was just because the decedent was himself the transferor of such property that it was held that the executor could not make it part of the personal property in the estate, with which alone he was concerned. Property transferred by the decedent can

never in Illinois come into the possession or control of the executor. Only creditors of the decedent can set such a transfer aside for their benefit.

Sifford v. *Cutler,* 244 Ill. 234, 236.
Choteau v. *Jones,* 11 Ill. 300, 320.

It follows of course that a judgment against an executor could not relate to property with which he could never be concerned. The Supreme Court of Illinois has therefore held that a judgment against an executor is binding only as to property to which he is entitled, and is of no effect as to property of the decedent which goes directly to his heirs or which has passed to others during his lifetime.

McGarvey v. *Darnall,* 134 Ill. 367, 370, 372.
Smith v. *Hunter,* 241 Ill. 514, 518.

It follows also that it is useless for any creditor of a decedent, including the Government, to pursue an executor of a decedent on account of property so transferred when all the time the creditor has the sole right himself to proceed against the transferee. A fruitless proceeding against the executor could not suspend the creditor's independent right, which has existed all the time, to proceed against the transferee on account of property that never passed into the hands of the executor.

The decisions of this Court are to the same effect. The application of the statute of limitations in such a case was clearly stated in an early case, *Ingle* v. *Jones,* 9 Wall. 486, where this Court said (p. 495):

> "* * * The duties of the administrator are confined to the personal estate, and never extend beyond it. If that be insufficient to discharge the debts, and it be necessary to resort to the realty of the deceased for that purpose, a proceeding against the heir must be instituted. In that event, whatever has been done by the administrator is without effect, as to the prop-

> erty sought to be charged. A judgment against the administrator is not evidence against the heir. The demand must be proved in all respects as if there had been no prior proceeding to effect its collection, *and the statute of limitations may be pleaded with the same effect as if there had been no prior recovery against the personal representative.*" (Italics ours.)

This Court has also held that where a voluntary transfer leaves a party insolvent there is no bar which prevents a creditor from proceeding immediately and directly against the holder of the assets so transferred.

Case v. *Beauregard*, 101 U. S. 688, 690.

And in dealing with the provisions of the 1926 Revenue Act this Court has held that there is no suspension of the statute of limitations under the transferee provisions where the Commissioner is not in fact prohibited from assessing the transferee liability.

United States v. *Continental National Bank & Trust Company*, 305 U. S. 398.

Similar principles apply in the application of the plea of *res judicata*. The universal holding of the courts in this country is that in order to bind a person who has not been a party to litigation that person must be in privity with a person actually involved in the litigation.

Bigelow v. *Old Dominion Copper Co.*, 225 U. S. 111, 126-129.

United States v. *California Bridge Co.*, 245 U. S. 337, 341.

This Court has defined privity in the *Bigelow case* as follows (p. 128-129):

> "What is privity? As used when dealing with the estoppel of a judgment, privity denotes mutual or successive relationship in the same right or property."

Therefore the courts have held that there is no privity between an administrator or executor and an heir.

Ingle v. *Jones,* 9 Wall. 486, 495.
McGarvey v. *Darnall,* 134 Ill. 367, 370.
Smith v. *Hunter,* 241 Ill. 514, 518.
Kamerer v. *Kamerer,* 281 Ill. 587.

These cases are all inconsistent with the decision of the Court of Appeals in this case. If the executor is the same person as the decedent then an heir is in privity with the executor just as much as is a transferee of the decedent in his lifetime. An heir also would be a transferee of the executor as well as of the decedent.

In order to avoid the effect of these decisions the Court of Appeals ignored them altogether. Instead it referred to the case of *Sanborn* v. *Helvering,* 108 F. (2d) 311, a case involving the relation of an executrix to a legatee, as if it presented the same situation on the question of privity that exists in this case. No question regarding a tax due by a decedent was involved in that case. The tax in question related to the year after the decedent's death. The taxpayer was the estate. There may have been a question as to whether, in view of the time of the discharge of the executrix, the tax was incurred by the estate or by the legatee, but the court held that the legatee, also the executrix, was in no position to claim that the estate was not the taxpayer. There was no question in the case which has any bearing on the issues in the pending case. Of course, in the *Sanborn* case the statute of limitations was suspended by the pendency of proceedings against the taxpayer, the estate, with reference to the same property which passed from the taxpayer to the legatee. The property involved in the pending case never passed to the executors at any time.

When the oral argument in the Court of Appeals was

reached counsel for the Commissioner had reason for being in doubt about his position. Therefore for the first time he called attention to Section 281 (a). This section is by its terms applicable to all persons occupying a fiduciary position. It does not attempt to change the law of the country with reference to the position of executors and administrators. In order that it should become effective in any case Subsection (c) of Section 281 required that a notice should be given by the fiduciary "in accordance with regulations prescribed by the Commissioner with the approval of the secretary."

The regulations (Reg. 69 Art. 1292) issued under Section 281, provide as follows:

> "The 'notice to the Commissioner' provided for in section 281 shall be a written notice signed by the fiduciary and filed with the Commissioner. The notice must state the name and address of the person for whom the fiduciary is acting, and the nature of the liability of such person; that is, whether it is a liability for taxes, and, if so, the year or years involved, or a liability at law or in equity * * *."

The regulations further provide,

> "Unless there is already on file with the Commissioner satisfactory evidence of the authority of the fiduciary to act for such person in a fiduciary capacity, such evidence must be filed with and made a part of the notice."

From the foregoing it is clear that the Court of Appeals, in relying on Section 281 in this case, when no notice under Section 281 was given, disregarded the specific terms of the statute. In order to bring the statute into operation the notice provided for must be in the form prescribed by the regulations. It is also apparent from the last portion of the regulations quoted above that information coming to the Commissioner in any other way does not satisfy that statute.

Moreover, Section 281(a) refers by its terms to the prop-

erty with reference to which the person giving the notice is acting as a fiduciary and provides that any tax shall be collected from the estate of the taxpayer. It does not attempt to confer, and could not confer, any jurisdiction over property with reference to which the person giving the notice is not acting as a fiduciary. A fiduciary can act as a fiduciary only with reference to the property in regard to which he is a fiduciary. Section 281(a) cannot make the fiduciary the owner or transferor of property which he does not hold as a fiduciary and confers power solely as to taxes which are to be paid out of the taxpayer's estate. Any judgment against such fiduciary can relate only to the property with which the fiduciary as such fiduciary is concerned. Section 281(a) therefore is entirely consistent with the settled law of the whole country on the scope of the powers of an executor or other fiduciary.

We have already called attention to the fact that Section 281 (a) was not enacted until after Rew had died. For this reason also this statutory provision has no proper place in this case. The Second Circuit Court of Appeals so held in *Liberman's Committee* v. *Commissioner,* 54 F. (2d) 527. In that case the Government contended that Section 281 (a) applied where fiduciaries had filed a return prior to the enactment of Section 281 and where, as in the instant case, no notice had ever been given to the Commissioner under Section 281. In denying the contention that 281 applied, the Court stated (page 529):

> "Secondly, and this seems to us a conclusive answer to the contention, section 281 (a), 26 U. S. C. A. Section 1070 (a), speaks prospectively from the date of its enactment, February 26, 1926, * * * *and relates only to actual fiduciaries who thereafter give notice to the Commissioner that they are acting as such.*" (Italics supplied.)

The Court in that case also disposed of the contention that the filing of the return by the fiduciary prior to the

enactment of the statute could operate as a substitute for the notice required by the statute.

Nevertheless, without referring to any statutory provision which can have any application, except this Section 281 (a), the Court of Appeals in this case says (R. 98):

> "In considering this question, we cannot rely entirely upon the ordinary rules governing privity of parties or of estates. On the contrary, we must keep in mind the theory of income taxation as reflected by the controlling legislation. Congress has seen fit, in order to prevent evasion of taxes, to fix a tax liability not only upon the transferor of property but, in case of his inability or failure to pay, likewise upon assets transferred by him.
>
> "* * * There is in this situation privity of title to the assets transferred and now sought to be reached by virtue of the statute. The presence of the executors need not confuse us. They are, for the purpose of determination, the transferor himself,—they are merely the voice of one who can no longer speak for himself and speak only for him and in his behalf. * * * We are not persuaded that the transferee may relitigate the tax liability fixed against his transferor; the transferee is bound by all that was decided and all that might have been decided in the prior litigation."

This language is used, as we have already pointed out, in the face of the statement of this Court in *Hartley* v. *Commissioner*, 295 U. S. 216, 218, that:

> "The revenue acts consistently treat the estate of a decedent in the hands of an administrator or executor as a separate taxpayer."

Also in *Hulburd* v. *Commissioner*, 296 U. S. 300, this Court considered the position of executors in Illinois under the law of Illinois and reversed this same Circuit Court of Appeals in a tax case because of its disregard of the law of that state. In this case the law of Illinois is completely ignored on the ground that the revenue acts have overruled that law, and the statement of this Court to the contrary is also ignored.

So far as the statute of limitations is concerned the holding of the Court is in direct conflict with the express language of Subsection 280 (c). That section, instead of providing that, in the case of the death of a taxpayer, his executor shall take his place and become the taxpayer, defines the decedent as still the taxpayer and provides that the period of the statute of limitations shall be the same that it would be had the taxpayer not died. This can mean only that as to other parties liable for taxes due by the decedent the statutory period is not changed. In this case that period expired in 1929, five years after the tax return for the decedent was made—the four year period fixed by Section 277 (a)(2) of the 1926 Act, plus one year granted by Section 280 in the case of a transferee.

The only support for the Court of Appeals decision to which it refers is Section 281 (a) of the Revenue Act of 1926. It states that:

> "Under Section 281 (a) the executors, upon qualification, so far as the liability of Rew for income tax was concerned, assumed the power, rights, duties and privileges of the taxpayer." (R. 96.)

And this is later stated to mean that, for the purpose of the determination of this case, the executors are "the transferor himself." (R. 98.)

There is nothing in the language of this section which suggests that executors can be treated as if they did the things which the decedent himself did. It does not purport to establish a new and special law as to executors or administrators in income tax cases. It applies to all fiduciaries. The Court of Appeals, however, turns it into a statute which changes the settled law in regard to executors or administrators.

The Court of Appeals also says, as quoted above, that:

> "Congress has seen fit, in order to prevent evasion of taxes, to fix a tax liability not only upon the transferor of property but, in case of his inability or failure

> to pay, likewise upon assets transferred by him" (R. 98).

Congress has done nothing of the kind; it has created no such liability. It has relied upon the general law with reference to the liability of transferees and has merely added certain administrative provisions regarding transferees. The entire statement of the Court of Appeals which we have quoted above finds no support whatever in the revenue acts. It is simply an invention of that Court.

In any event it was too late to bring Section 281 (a) into the case for the first time at the oral argument in the Circuit Court of Appeals. This change did not mean merely a new theory to support the decision of the Board and the Commissioner. It made a new case which was not presented before. Instead of a case arising on the basis of principles of the common law or the local law of Illinois, a federal statute was brought in for the purpose of claiming that the local law might be superseded by a federal statute which revolutionized the established law and identified the executor of an estate with the decedent in such a way that, for income tax purposes, the executor could be regarded as doing the things the decedent himself did while alive. This Court has held that such a change in a case cannot be made for the first time in an appellate court.

General Utilities & Operating Co. v. *Helvering*, 296 U. S. 200.

Helvering v. *Tex-Penn Oil Co.*, 300 U. S. 481, 498.

Helvering v. *Wood*, 309 U. S. 344, 349.

II.

There Is No Ground for the Assertion of a Tax Liability Against Petitioners in This Case.

1. On December 31, 1923, Rew entered into an agreement to exchange with Peabody, Houghteling & Co. 6,150 shares of the preferred stock of Calumet Baking Powder Company for certain miscellaneous unlisted securities (Rec. 11-14). Under that contract Rew could not sell or negotiate for the sale of or pledge any of the securities received by him for a period of six months from and after December 31, 1923. The record further shows that there was no market on which Rew could have sold the securities if he had been free to sell and that they had no fair market value which could afford the basis of the tax claimed. Under such circumstances the decision of this and other federal courts is to the effect that no taxable gain is realized.

Helvering v. *Tex-Penn Co.*, 300 U. S. 481, 489.
Schuh Trading Co. v. *Commissioner*, 95 F. (2d) 404.
Propper v. *Commissioner*, 89 F. (2d) 617.

2. It is not disputed that the shares of stock in question in this case were delivered by Rew to the purchaser on December 31, 1923, in pursuance of a contract made and executed on that date. The bonds received by Rew within a few days were delivered and received in satisfaction of the provisions of the contract and the gain was realized if at all on December 31, 1923. In the prior case involving the executors no attack was made on the findings of fact by the Board and no record of the evidence was presented to the Court of Appeals. In this case the record presents the evidence and the Board was requested to reexamine the testimony and make a finding of fact in accordance with the evidence. This request was ignored. We submit that

this refusal of the Board to make such a finding is error which should require a reversal of this case.

3. The record in this case shows no ground upon which the petitioners can be held liable as transferees. The Board found that after Rew made an irrevocable trust dated December 31, 1923, "he was still solvent and retained sufficient assets to pay his tax liability here in question" (Rec. 79). Rew made a revocable trust on March 10, 1924, and it is this revocable trust which is held liable for the tax in question.

The Board states that this revocable trust "left the decedent and his estate insolvent" (Rec. 80). The Board, however, does not state on what ground the liability of petitioners is based and the Court of Appeals ignores the question. Under the trust of March 10, 1924, Rew retained the income for life and an unlimited power of revocation. He was just as solvent after March 10th as he was before, and for tax purposes he was still regarded as the owner of the trust property. Clearly the claim against petitioners must be based upon the unexpected death of Rew in June and not upon the transfer in March. Insolvency at death has no relation to insolvency when such a trust was created, no matter how long before death that may have been. Tax liability is a practical matter and it is held that the liability of a grantor is not changed by the creation of a revocable trust or a short term trust. The trust may be disregarded, but death is another matter and cannot be overlooked. There is no recognized principle of law or equity, however, and no federal statute which creates a transferee liability on the death of the grantor of a revocable trust if, at that time and by reason of death, his estate becomes insolvent.

In the prior case involving the executors the Court of Appeals refused to treat the case as moot because the Commissioner knew there was no property left in the estate.

In this case, where the burden to show transferee liability is upon the Commissioner, there is no evidence to show insolvency on March 10, 1924, when the trust was established, and no claim that transferee liability arose on Rew's unexpected death in June of that year. Obviously, some new theory must be found in order to establish the liability of petitioners in this case.

For the above reasons we submit that the decision in this case should be reviewed.

Respectfully submitted,

HERBERT POPE,
FRANCIS H. URIELL,
BENJAMIN M. PRICE,
Counsel for Petitioners.

September 5, 1940.

APPENDIX.

Section 277 (a) (2) of Revenue Act of 1926.

Sec. 277 (a) (2). The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year of 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

Section 277 (b) of Revenue Act of 1926, as Amended by Section 504 of Revenue Act of 1928.

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.

Excerpts from Section 280 of Revenue Act of 1926.

Sec. 280 (a). The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case

of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

* * * * *

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

* * * * *

Section 281 of Revenue Act of 1926.

Sec. 281. (a) Upon notice to the Commissioner that any person is acting in a fiduciary capacity such fiduciary shall assume the powers, rights, duties, and privileges of the taxpayer in respect of a tax imposed by this title or by prior income, excess-profits, or war-profits tax Act (except as otherwise specifically provided and except that the tax shall be collected from the estate of the taxpayer), until notice is given that the fiduciary capacity has terminated.

(b) Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in section 280, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated.

(c) Notice under subdivision (a) or (b) shall be given in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

(d) In the absence of any notice to the Commissioner under subdivision (a) or (b), notice under this title of a deficiency or other liability, if mailed to the taxpayer or other person subject to liability at his last known address, shall be sufficient for the purposes of this title even if such taxpayer or other person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 412

THE FIRST NATIONAL BANK OF CHICAGO, EDGAR STANTON AND JOSEPH C. BELDEN, TRUSTEES FOR THE REW TRUST, TRANSFEREES,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION.

HERBERT POPE,
FRANCIS H. URIELL,
BENJAMIN M. PRICE,
Counsel for Petitioners.

October 8, 1940.

THE DUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

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THE FIRST NATIONAL BANK OF CHICAGO, EDGAR STANTON AND JOSEPH C. BELDEN, TRUSTEES FOR THE REW TRUST, TRANSFEREES,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION.

Respondent's Brief in Opposition in this case was not only served too late under the rules of this Court, as we understand them, but Government counsel misstate the ground upon which the Circuit Court of Appeals based its decision. It states that Section 281(a) was referred to by that Court as "merely illustrative of the settled principle that an executor takes the place of the decedent."

What the Circuit Court of Appeals held was that "Under Section 281 (a) the executors upon qualification, so far as the liability of Rew for income tax was concerned, assumed the power, rights, duties and privileges of the taxpayer." That could not be true because that Section admittedly had not then been enacted; and the Second Circuit Court of Appeals expressly held that this Section could not

operate retroactively. *Liberman's Committee* v. *Commis*
sioner, 54 F. (2d) 527. As to any "settled principle" th
Court of Appeals said: "We cannot rely entirely upon th
ordinary rules governing privity of parties or of estates,"
and based its decision upon "the theory of income taxa
tion." The only statute cited was Section 281(a).

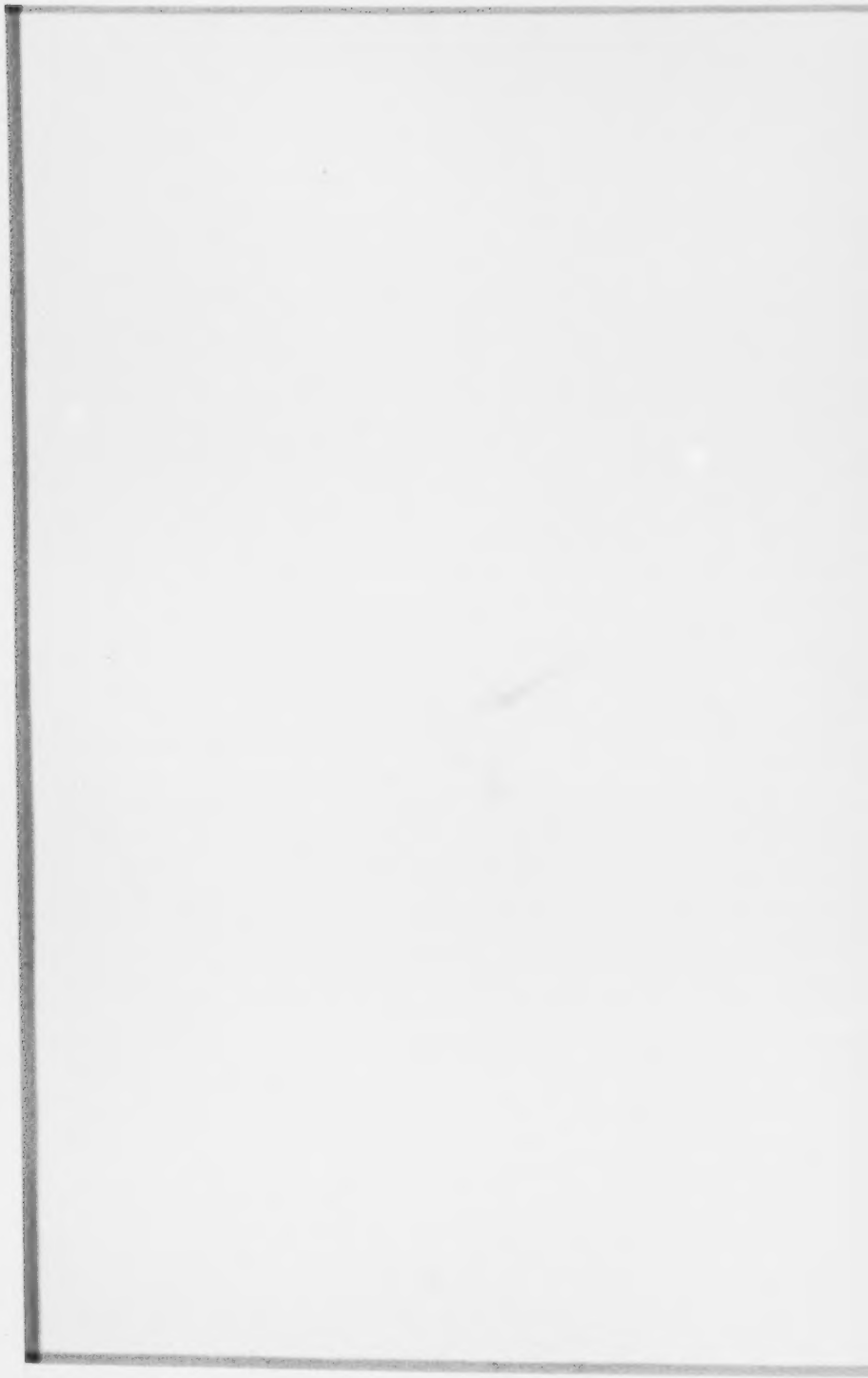
There is not only no "settled principle that an executo
takes the place of the decedent," but the decisions of th
Court and of the Supreme Court of Illinois and of all othe
courts are to the contrary. No case is cited by the Cou
of Appeals or by Government counsel which supports th
alleged "settled principle." The decision of this Court
Ingle v. *Jones,* 9 Wall. 486, 495, denies this "settled pri
ciple" both as to the statute of limitations and the questio
of *res judicata.* The decisions of the Supreme Court
Illinois are to the same effect, as was pointed out in th
petition in this case. In the Court of Appeals Governme
counsel tried to escape from the "settled principle" th
was settled against them by citing Section 281(a). No
they seek to escape from Section 281(a) to the "settl
principle" which the Court of Appeals ignored.

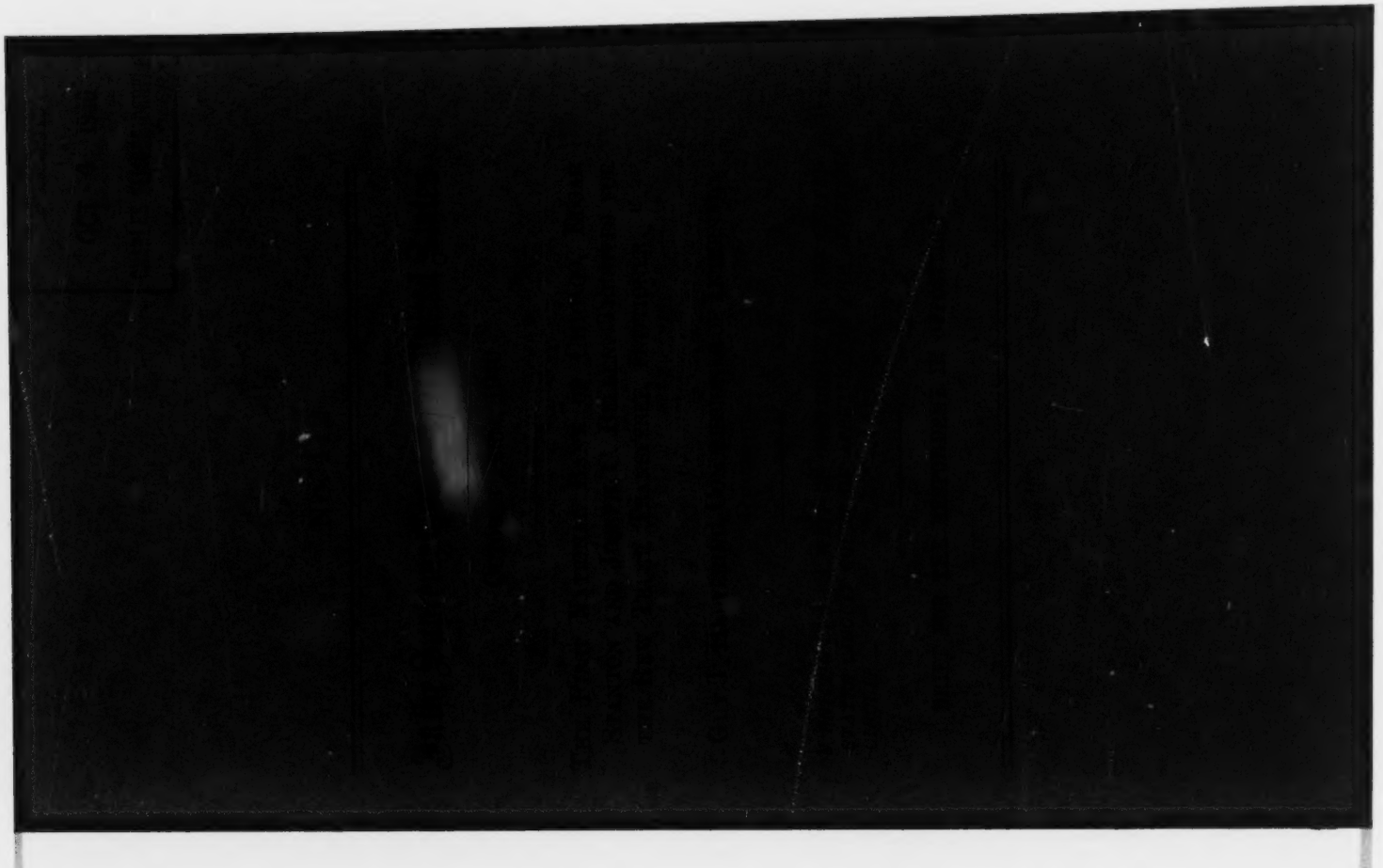
We submit that even in an income tax case the law
the country should be given some consideration.

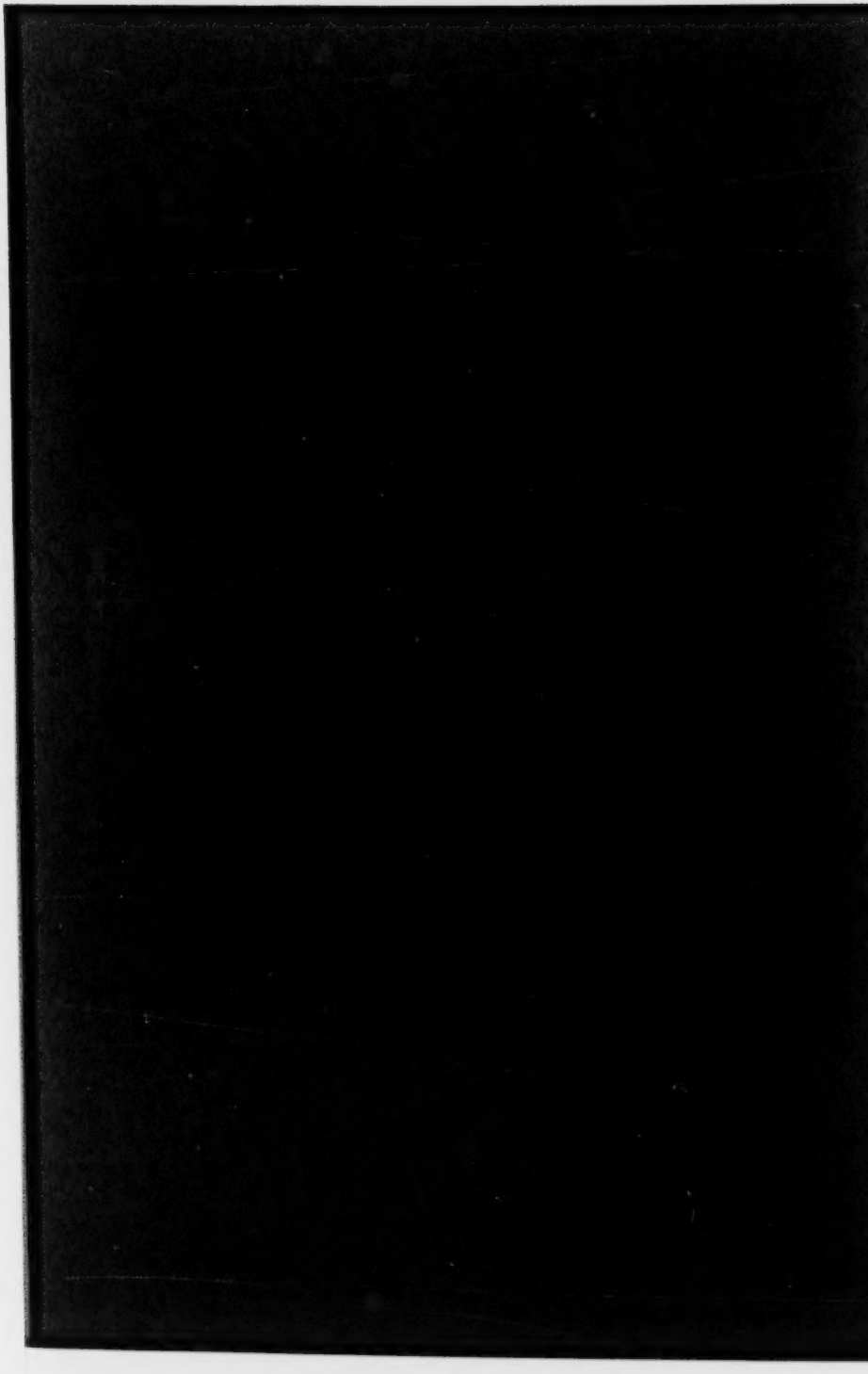
Respectfully submitted,

HERBERT POPE,
FRANCIS H. URIELL,
BENJAMIN M. PRICE,
Counsel for Petitione

October 8, 1940.







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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 412

THE FIRST NATIONAL BANK OF CHICAGO, EDGAR STANTON AND JOSEPH C. BELDEN, TRUSTEES FOR THE REW TRUST, TRANSFEREE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 73–80) is unreported. The opinion of the Circuit Court of Appeals (R. 95–100) is reported in 112 F. (2d) 260.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 13, 1940 (R. 101). A petition for rehearing was denied June 11, 1940 (R. 113).

The petition for a writ of certiorari was filed September 9, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the liability asserted against the petitioners as transferees of the deceased taxpayer for an income tax deficiency for the last period of his life was barred by limitation, or whether the running of the statute of limitations was suspended by a prior proceeding instituted by the decedent's executors in respect of that deficiency.

2. Whether the petitioners, as transferees of the assets of decedent, are liable for the unpaid deficiency determined in the prior proceeding instituted by the executors.

STATUTES INVOLVED

The pertinent provisions of the statutes involved will be found in the Appendix, *infra,* pp. 11–14.

STATEMENT

The facts found by the Board of Tax Appeals (R. 73–75) may be summarized as follows:

On March 10, 1924, George Campbell Rew created "The Rew Trust," with himself as trustee, to which he transferred all of his assets and under which he reserved the income to himself for life and retained unlimited power of revocation. He received no consideration for the transfer and as a result thereof he, as well as his estate after his

death, was left without assets with which to satisfy the tax liability here involved (R. 75).

Rew died testate on June 10, 1924, and his executors, Edgar Stanton and Joseph C. Belden, on or about October 8, 1924, filed a federal income tax return on his behalf for the period of January 1 to June 10, 1924. On September 11, 1928, a notice of deficiency of $75,539.72 in income tax for that period was mailed to the executors, who, on November 10, 1928, filed with the Board of Tax Appeals a petition for redetermination of the deficiency. The Board, on April 28, 1936, promulgated its findings of fact and opinion (34 B. T. A. 451), and pursuant thereto, on June 5, 1936, entered a decision that there was a deficiency for that period in the amount of $75,478.47. The executors thereafter filed a petition for review with the Circuit Court of Appeals for the Seventh Circuit, which on July 28, 1938, affirmed (98 F. (2d) 739) the decision of the Board. The executors then filed a petition for a writ of certiorari, which was denied by this Court on December 5, 1938 (305 U. S. 650) (R. 73–74).

The deficiency of $75,478.47, with interest, determined by the Board, was assessed against the executors on September 18, 1936, but has never been paid (R. 74).

On June 23, 1937, a notice of deficiency (R. 7–9) was sent to the First National Bank of Chicago, trustee for the Rew Trust, proposing to assess the deficiency of $75,478.47, with interest, in the in-

come tax of the decedent for the period of January 1 to June 10, 1924, against that trust as transferee of the assets of the deceased taxpayer (R. 74–75).

The value of the property in the Rew Trust has at all times exceeded the amount of the tax liability and interest in question (R. 75).

The petitioners, the present trustees of the Rew Trust, appealed to the Board of Tax Appeals, which, holding that the decision as to the deficiency on the merits in the prior proceeding was conclusive and that the assertion of transferee liability was not barred by limitation, sustained the deficiency against them as transferees (R. 73–80). The decision of the Board was affirmed by the court below (R. 95–100).

ARGUMENT

1. Under Section 277 (a) (2) of the Revenue Act of 1926, the taxes in question could be assessed against the taxpayer within four years after the filing of the return, and under Section 280 (c) the period of limitations remains the same notwithstanding the death of the taxpayer. Since the return in this case was filed October 8, 1924 (R. 74), and since the Commissioner's notice of deficiency was mailed to the executors on September 11, 1928 (R. 74), it is plain that that notice was timely. The executors thereupon sought review of the Commissioner's determination in the Board of Tax

Appeals, and under Section 277 (b), as amended, the running of the period of limitations for assessment was automatically suspended until the decision of the Board became final and for 60 days thereafter. The decision of the Board became final on December 5, 1938, so that the running of the unexpired portion of the period of limitations against assessment was suspended until 60 days thereafter.

The petitioners herein, however, are transferees, and Section 280 (b) (1) extends the period of limitations for assessment against a transferee "one year after the expiration of the period of limitation for assessment against the taxpayer." But the Commissioner's notice of deficiency to the petitioners was sent on June 23, 1937, long before the expiration of the period of limitations, as suspended by Section 277 (b) and as extended by Section 280 (b) (1).

The holding of the court below that the Commissioner's action was timely, scrupulously followed the applicable statutory provisions, and was in accord with judicial decision. *Sanborn* v. *Helvering,* 108 F. (2d) 311 (C. C. A. 8th).[1]

---

[1] See also *American Equitable Assur. Co. of New York* v. *Helvering*, 68 F. (2d) 46 (C. C. A. 2d); *Continental Products Co.* v. *Commissioner*, 66 F. (2d) 434 (C. C. A. 1st); *Parker* v. *Commissioner*, 30 B. T. A. 342, affirmed, 84 F. (2d) 838 (C. C. A. 8th); *U S L Battery Corp.* v. *Commissioner*, 32 B. T. A. 810, affirmed, 84 F. (2d) 1020 (C. C. A. 2d), certiorari denied, 299 U. S. 593; *Hoosac Mills Corp.* v.

2. The petition is based chiefly upon the unwarranted assumption that the decision below rests upon some novel provision of federal taxing law contained in Section 281 (a) of the Revenue Act of 1926,[2] which, not enacted until after decedent's death, is variously asserted to be inapplicable here. (Pet. 2–3, 7–10, 11–12, 14, 15, 18–23.) The real basis of the decision of the court below, however, is that (R. 97–98) the prior proceeding instituted before the Board by the executors as representatives of the decedent, in respect of a deficiency in tax upon the income of the decedent, suspended the running of the statute of limitations just as much as a proceeding instituted by the decedent himself would have done (cf. R. 77–79). The reference in the opinion below (R. 96, 97) to Section 281 (a) was merely illustrative of the settled principle that an executor takes the place of the decedent. Entirely without regard to the provisions of Section

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Commissioner, 75 F. (2d) 462 (C. C. A. 1st); *Buzard* v. *Helvering*, 77 F. (2d) 391 (App. D. C.); *Commissioner* v. *Gerard*, 78 F. (2d) 485 (C. C. A. 9th), and *California Iron Yards Corp.* v. *Commissioner*, 82 F. (2d) 776 (C. C. A. 9th), certiorari denied, 299 U. S. 553.

[2] SEC. 281(a) provides: Upon notice to the Commissioner that any person is acting in a fiduciary capacity such fiduciary shall assume the powers, rights, duties, and privileges of the taxpayer in respect of a tax imposed by this title or by prior income, excess-profits, or war-profits tax Act (except as otherwise specifically provided and except that the tax shall be collected from the estate of the taxpayer), until notice is given that the fiduciary capacity has terminated."

281 (a), executors have the right to litigate a liability of the decedent as his personal representatives, and the executors of Rew—who are two of the present petitioners [3]—did so in this case. The only new provision added by Section 281 (a) is the requirement of a notice of termination of the fiduciary capacity before the executors can be relieved of liability, even though they might have been discharged as executors (see *Sanborn* v. *Helvering*, 108 F. (2d) 311 (C. C. A. 8th); cf. *Hulburd* v. *Commissioner*, 296 U. S. 300, and *Olsen* v. *Helvering*, 88 F. (2d) 650 (C. C. A. 2d)), and the decision below does not rest on that new provision.

Liberman's Committee v. *Commissioner*, 54 F. (2d) 527 (C. C. A. 2d), deals with that requirement, imposed by Section 281 (a), relating to notice of termination of fiduciary capacity, to relieve the fiduciary of liability. Hence, the holding there that the requirement of notice of termination cannot be applied retroactively to a relation terminated before the enactment of that provision is obviously not in conflict, as urged (Pet. 8–9), with the deci-

[3] At least those two petitioners are hardly in a position to take advantage here of the delay which they themselves occasioned by their prior appeal to the Board. Cf. *Buzard* v. *Helvering*, 77 F. (2d) 391, 396 (App. D. C.); *Haag* v. *Commissioner*, 59 F. (2d) 516, 518 (C. C. A. 7th); *Warner Collieries Co.* v. *United States*, 63 F. (2d) 34, 35 (C. C. A. 6th); *Burnet* v. *San Joaquin Fruit & Investment Co.*, 52 F. (2d) 123, 127 (C. C. A. 9th); *Continental Products Co.* v. *Commissioner*, 66 F. (2d) 434, 435 (C. C. A. 1st).

sion below, which does not involve any termination of fiduciary capacity.

Nor is the decision below in conflict, as asserted (Pet. 10–11), with *Commissioner* v. *Krug,* 78 F. (2d) 57 (C. C. A. 9th). The holding in that case that a previous defective appeal to the Board did not suspend the running of the statute of limitations is clearly distinguishable from the present case. There, the proposed deficiency from which the prior appeal had been taken was *another* deficiency, different from the deficiency sought to be enforced against transferee Krug, and the prior appeal had been taken by another person not in privity with the original taxpayer or transferee Krug. The prior appeal to the Board in the instant case was not, as in the *Krug* case, by a separate taxpaying entity, separate from the taxpayer-transferor, but by the executors as representative of the taxpayer himself, in respect of a deficiency in tax against the taxpayer, with whom they were in privity, which is the same deficiency as the one sought to be enforced against the petitioners as transferees of the taxpayer. Hence, it is obvious that the decision below is not in conflict, as claimed (Pet. 9–10), with the statement made by this Court in *Hartley* v. *Commissioner,* 295 U. S. 216, that the estate is a taxpaying entity separate from the taxpayer. That statement refers to the estate's lia-

bility for taxes on income received after the death of the decedent, as distinguished from the liability in respect of taxes of the decedent during his life.

3. Since the petitioners received as gratituous transferees property of a value in excess of the tax liability of the taxpayer-transferor, the transfer of which left the taxpayer-transferor, or his estate, without assets out of which the tax could be paid, the Board and the court below correctly held the petitioners liable for the tax as transferees. *Phillips* v. *Commissioner,* 283 U. S. 589; *Sanborn* v. *Helvering,* 108 F. (2d) 311 (C. C. A. 8th). They were properly held liable for the amount of the tax determined in the prior proceeding instituted by the executors of the taxpayer-transferor, just as they would have been if the prior proceeding had been instituted by the taxpayer himself. *In re Wolf Mfg. Industries,* 56 F. (2d) 64 (C. C. A. 7th); *Jahncke Service, Inc.* v. *Commissioner,* 20 B. T. A. 837, appeal dismissed (C. C. A. 5th), February 10, 1933; *California Iron Yards Corp.* v. *Commissioner,* 82 F. (2d) 776 (C. C. A. 9th), certiorari denied, 299 U. S. 553; *Sanborn* v. *Helvering, supra.* The prior decision on the merits was conclusive as to all matters decided or which might have been decided. Cf. *Tait* v. *Western Md. Ry. Co.,* 289 U. S. 620.

CONCLUSION

The decision of the court below is correct, and there is no conflict of decisions. The petition should be denied.

Respectfully submitted.

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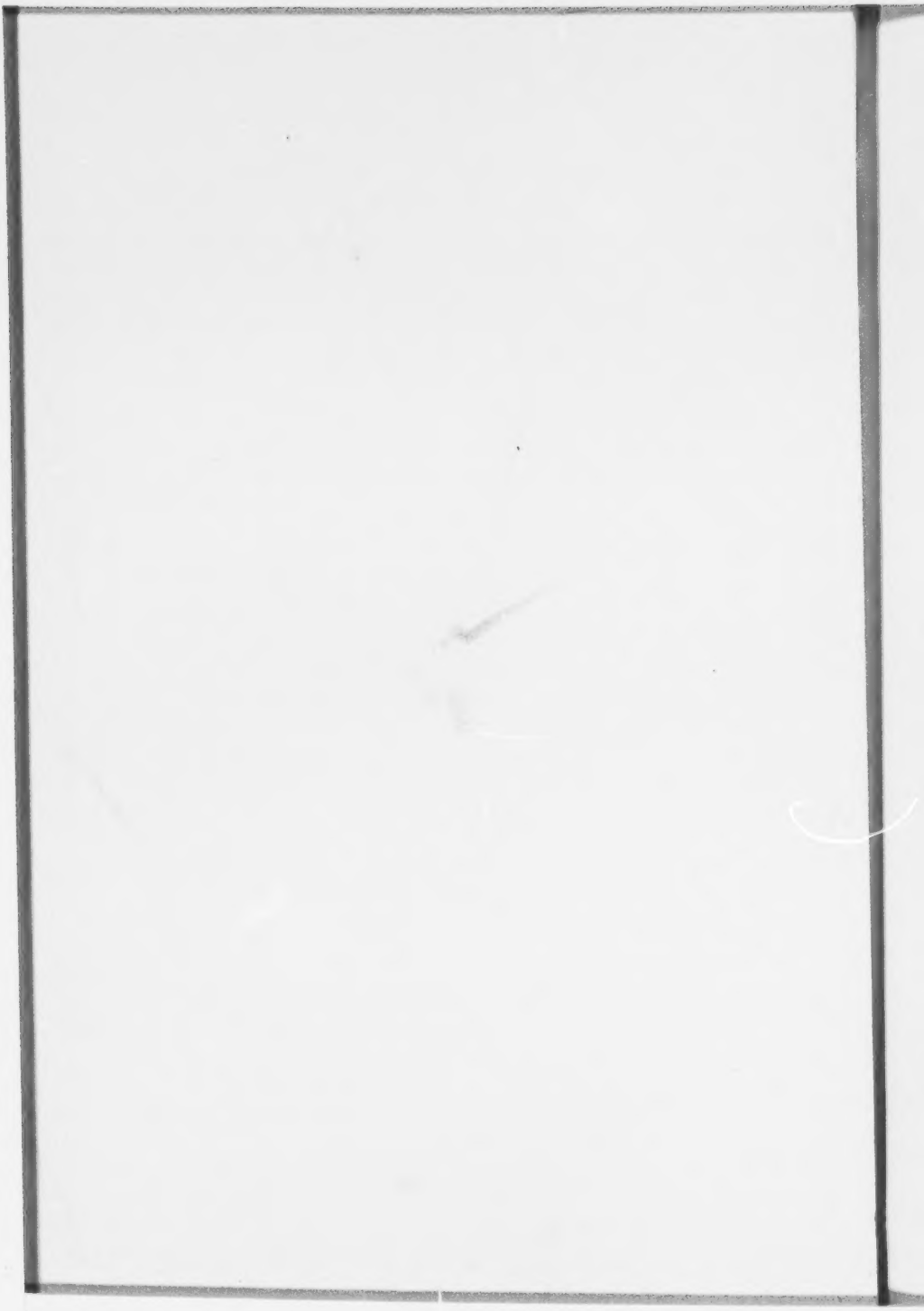

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. * * *

(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. * * *

* * * * *

(h) For the purposes of this title the date on which a decision of the Board becomes final shall be determined according to the provisions of section 1005.

* * * * *

PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX

SEC. 277. (a) Except as provided in section 278—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(b) [As amended by Section 504 of the Revenue Act of 1928, c. 852, 45 Stat. 791]

The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.

CLAIMS AGAINST TRANSFERRED ASSETS

SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, col-

lected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. * * *

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

* * * * *

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

* * * * *

TAXES UNDER PRIOR ACTS

SEC. 283. (a) If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of

any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such determination the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act.

DATE ON WHICH BOARD'S DECISION BECOMES FINAL

SEC. 1005. (a) The decision of the Board shall become final—

* * * * *

(3) Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or * * *

* * * * *

[U. S. C., Title 26, Sec. 640.]

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